

NO JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OKSANA BAIUL, an individual,)	Case No. CV 15-05163 DDP (MRWx)
)	
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S MOTION
v.)	TO DISMISS
)	
NBC SPORTS, A DIVISION OF)	
NBCUNIVERSAL MEDIA, LLC, a)	
Delaware limited liability)	
company; ON ICE INC., a)	
California corporation BARRY)	[Dkt. 31]
MENDELSON, an individual,)	
)	
Defendants.)	
_____)	

Presently before the court is Defendant NBC Sports ("NBC")'s Motion to Dismiss. Having considered the submissions of the parties, the court grants the motion and adopts the following Order.

I. Background

This case arises from a dispute between Plaintiff Oksana Baiul and Defendants NBC, On Ice, Inc. ("OII"), and Barry Mendelson ("Mendelson"). Plaintiff alleges that Defendants converted and were unjustly enriched by Plaintiff's 1994 headline performance in

1 "Nutcracker on Ice." (First Amended Complaint ("FAC") ¶ 1.) The
2 performance was recorded pursuant to an agreement between OII and
3 NBC. (Id. ¶ 2.) According to Plaintiff, under this agreement,
4 "NBC Sports agreed to pay all production expenses associated with
5 the Picture, including royalties to Oksana pursuant to the
6 'performance agreement' between Oksana, on the one hand, and OII
7 and NBC Sports, on the other hand." (Id. ¶ 3 (certain internal
8 quotation marks omitted).) Plaintiff alleges, however, that due to
9 "fraud or mistake," Oksana never actually entered into any separate
10 "performance agreement" with either OII or NBC. (Id.) Plaintiff
11 further contends that she has been paid no royalties from the
12 performance. (Id.) As a result of this failure, Plaintiff asserts
13 that she entitled to "no less than \$10,000,000." (FAC at 8:21.)
14 NBC now moves to dismiss.

15 **II. Legal Standard**

16 A complaint will survive a motion to dismiss when it contains
17 "sufficient factual matter, accepted as true, to state a claim to
18 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
19 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
20 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
21 "accept as true all allegations of material fact and must construe
22 those facts in the light most favorable to the plaintiff." Resnick
23 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
24 need not include "detailed factual allegations," it must offer
25 "more than an unadorned, the-defendant-unlawfully-harmed-me
26 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
27 allegations that are no more than a statement of a legal conclusion
28 "are not entitled to the assumption of truth." Id. at 679. In other

1 words, a pleading that merely offers "labels and conclusions," a
2 "formulaic recitation of the elements," or "naked assertions" will
3 not be sufficient to state a claim upon which relief can be
4 granted. Id. at 678 (citations and internal quotation marks
5 omitted).

6 "When there are well-pleaded factual allegations, a court
7 should assume their veracity and then determine whether they
8 plausibly give rise to an entitlement of relief." Id. at 679.
9 Plaintiffs must allege "plausible grounds to infer" that their
10 claims rise "above the speculative level." Twombly, 550 U.S. at
11 555. "Determining whether a complaint states a plausible claim for
12 relief" is a "context-specific task that requires the reviewing
13 court to draw on its judicial experience and common sense." Iqbal,
14 556 U.S. at 679.

15 **III. Discussion**

16 **A. Conversion**

17 "To establish [a claim for conversion], a plaintiff must show
18 'ownership or right to possession of property, wrongful disposition
19 of the property right and damages.'" Kremen v. Cohen, 337 F.3d
20 1024, 1029 (9th Cir. 2003) (quoting G.S. Rasmussen & Assoc., Inc.
21 v. Kalitta Flying Serv., Inc., 958 F.2d 896, 906 (9th Cir. 1992)).
22 California courts "apply a three-part test to determine whether a
23 property right exists: 'First, there must be an interest capable of
24 precise definition; second, it must be capable of exclusive
25 possession or control; and third, the putative owner must have
26 established a legitimate claim to exclusivity.'" Kremen, 337 F.3d
27 at 1030 (quoting G.S. Rasmussen, 958 F.2d at 903).

1 Although at common law, conversion was limited to tangible
2 property, California has rejected this distinction. See Payne v.
3 Elliot, 54 Cal. 339 (1880); Fremont Indem. Co. v. Fremont Gen.
4 Corp., 148 Cal. App. 4th 97 (2007). Under California law,
5 "[p]roperty is a broad concept that includes 'every intangible
6 benefit and prerogative susceptible of possession or disposition.'" Kremen, 337 F. 3d at 1030 (quoting Downing v. Mun. Court, 88 Cal.
7 App. 2d 345, 350 (1948)). Here, the FAC alleges that "Defendants
8 and each of them have converted Oksana Performance (sic) to their
9 benefit in the use and exploitation of the Picture with no
10 consideration to Plaintiffs." (FAC ¶ 18.) The FAC further alleges
11 that "[a]s a direct, proximate and foreseeable result of the
12 conversion by Defendants of Oksana's Performance" she is "entitled
13 to monetary restitution of the value of the Oksana Performance in
14 an amount of no less than \$10,000.000." (Id. ¶ 19.)

16 Conversion claims involving intangible property may, however,
17 run afoul of federal copyright law. See Weller Const., Inc. v.
18 Mem'l Healthcare Servs., No. SACV 14-01115-CJC, 2014 WL 5089422 at
19 *3 (C.D. Cal. Oct. 8, 2014). A state law claim is preempted where
20 the work at issue comes within the subject matter of copyright and
21 the state law grants rights equivalent to those protected by
22 federal copyright law. Idema v. Dreamworks, Inc., 162 F.Supp.2d
23 1129, 1189 (C.D. Cal. 2001). Plaintiff argues that her claims fall
24 outside the copyright act because although "Shakespeare could agree
25 with Oksana that while she is a 'tangible' living, breathing 'piece
26 of work,' she is not 'fixed in a tangible medium of expression'
27 within the intendment of the Copyright Act." (Opp. at 14:7-9.)
28 The thrust of this argument is not entirely clear to the court, as

1 Plaintiff does not allege that Defendants converted her, but rather
2 the performance, which was recorded. Indeed, without such
3 fixation, it is unclear how any of the allegedly withheld royalties
4 could possibly have been generated, and Plaintiff herself
5 acknowledges that her claim is related to money earned "from the
6 filming of her live performances." (Opp. at 15:11-12.)

7 Nor is the court persuaded by Plaintiff's argument that she is
8 asserting rights distinct from those protected by copyright law.
9 Although Plaintiff argues that her claim is for money wrongly
10 withheld from her, and is unrelated to Defendants' right to exploit
11 the film, that is not what the FAC alleges. (FAC ¶ 18.)

12 ("Defendants and each of them have converted Oksana['s] Performance
13 to their benefit in the use and exploitation of the Picture with no
14 consideration to Plaintiffs.") California courts have rejected
15 similar attempts to distinguish conversion claims from rights under
16 copyright law.¹ See Melchior v. New Line Prods., Inc., 106 Cal.
17 App. 4th 779, 792 (2003); Cf. Dead Kennedys v. Biafra, 37 F.Supp.
18 2d 1151, 1154 (N.D. Cal. 1999) (finding conversion claim not
19 preempted where claim alleged "conversion of royalties, not of the
20 works themselves.").

21 Even if Plaintiff's conversion claim were not preempted by the
22 Copyright Act, it would still be barred by the statute of
23 limitations. "Code of Civil Procedure section 338, subdivision (c)
24 provides for a three-year statute of limitations for actions
25 alleging conversion." Strasberg v. Odyssey Group, 51 Cal. App. 4th
26 906, 915 (1996). "Under California law, the general rule is well

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28 ¹ Although the opposition makes some reference to an implied
contract claim, the FAC alleges no such claim.

1 established: '[T]he statute of limitations for conversion is
2 triggered by the act of wrongfully taking property.'" AmerUS Life
3 Ins. Co. v. Bank of America, N.A., 143 Cal. App. 4th 631, 639
4 (2006) (quoting Bono v. Clark, 103 Cal. App. 4th 1409, 1433 (2002)).
5 In cases of fraudulent concealment or violation of a fiduciary
6 duty, a "discovery rule" exception may toll the statute until an
7 aggrieved party discovers, or should have discovered, the
8 conversion. AmerUS Life, 143 Cal. App. 4th at 639. Here, although
9 the Performance occurred in 1994 and the last alleged distribution
10 agreement was executed in 1995, the FAC conclusorily asserts that
11 Plaintiff's claims were not discoverable before 2014. (FAC ¶ 5.)
12 This is insufficient. "In order to rely on the discovery rule for
13 delayed accrual of a cause of action, '[a] plaintiff whose
14 complaint shows on its face that his claim would be barred without
15 the benefit of the discovery rule must specifically plead facts to
16 show (1) the time and manner of discovery and (2) the inability to
17 have made earlier discovery despite reasonable diligence.'" Fox v.
18 Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 808 (2005) (quoting
19 McKelvey v. Boeing North American, Inc., 74 Cal. App. 4th, 151, 160
20 (1999)). The only specifically alleged fact bearing on Plaintiff's
21 diligence is that "[a]t the time of the execution of the Nutcracker
22 Agreement, Oksana was a minor who could not read or write in the
23 English language, and with a limited understanding of spoken
24 English language." (FAC ¶ 5.) The Nutcracker Agreement, however,
25 was executed no later than 1994. The FAC is silent as to what
26 steps Plaintiff took, or difficulties she faced, upon reaching the
27 age of majority or at any time in the twenty-odd years preceding
28

1 the filing of this action. Plaintiff has not, therefore, met her
2 burden to show diligence. See Fox 35 Cal. 4th at 807.

3 B. Unjust Enrichment

4 "Unjust enrichment is a 'general principle, underlying various
5 legal doctrines and remedies,' rather than a remedy itself."
6 Melchior, 106 Cal. App. 4th at 793 (quoting Dinosaur Dev., Inc. v.
7 White, 215 Cal. App. 3d 1310, 1315 (1989). "There is no cause of
8 action in California for unjust enrichment." Id.; See also
9 Robinson v. HSBC Bank USA, 732 F.Supp.2d 976 (N.D.Cal.2010)
10 ("California does not recognize a stand-alone cause of action for
11 unjust enrichment."). The First Cause of Action is, therefore,
12 dismissed.

13 C. Accounting

14 Some courts have held "that an accounting is merely an
15 equitable remedy, and therefore cannot be maintained as an
16 independent cause of action." Fradis v. Savebig.com, No. CV 11-
17 7275 GAF, 2011 WL 7637785 at *8 (C.D. Cal. Dec. 2, 2011). Other
18 courts, however, citing Tesselle v. Mcloughlin, 173 Cal. App.4th
19 156 (2009), have concluded that an accounting can exist as an
20 independent equitable cause of action. See, e.g., Dahon North Am.,
21 Inc. v. Hon, No. 11-cv-5835 ODW, 2012 WL 1413681 at * 11 (C.D. Cal.
22 Apr. 24, 2012); see also Baidooobonso-Iam v. Bank of Am., No. CV 10-
23 9171 CAS, 2011 WL 3103165 at *6 (C.D. Cal. Jul. 25, 2011) ("An
24 accounting may take the form of either a legal remedy or an
25 equitable claim.").

26 Where independently viable, a cause of action for an
27 accounting requires that "a relationship exist[] between the
28 plaintiff and defendant that requires an accounting, and that some

1 balance is due the plaintiff that can only be ascertained by an
2 accounting." Tesselle, 173 Cal. App. 4th at 179. Though the
3 relationship giving rise to an accounting claim need not
4 necessarily be a fiduciary one, courts typically require that it
5 reflect some degree of confidentiality or closeness. Tesselle, 173
6 Cal.App.4th at 179.; Dahon, 2012 WL 1413681 at *13; Fradis, 2011 WL
7 7637785 at *9; Canales v. Fed. Home Loan Mortgage Corp., No. CV 11-
8 2819 PSG, 2011 WL 3320478 at * 8 (C.D. Cal. Aug. 1, 2011). Here,
9 Plaintiff merely alleges that "Defendants have failed and refused
10 and continue to fail and refuse to account to and pay Plaintiffs .
11 . . [, and an] accounting is necessary and appropriate since the
12 exact and precise monies due to Plaintiffs are unknown to
13 Plaintiffs and cannot be ascertained without an accounting." (FAC
14 ¶ 21.) Such allegations fail to establish the existence of any
15 close or confidential relationship between Plaintiff and any
16 Defendant. The accounting claim is, therefore, dismissed.

17 **IV. Conclusion**

18 For the reasons stated above, Defendant's Motion to Dismiss is
19 GRANTED. Any amended complaint shall be filed within fourteen days
20 of the date of this Order.

21
22 IT IS SO ORDERED.

23
24
25 Dated: February 2, 2016



26 DEAN D. PREGERSON

27 United States District Judge
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